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Supreme Court, U.S.
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No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

May the due process right to a no-parole instruction identified by this Court for the first time in *Simmons v. South Carolina* be extended to a state prisoner on federal collateral review who does not dispute the fact that under state law he was eligible for parole on a life sentence when his capital jury sentenced him to death?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

I. Ramdass' Offenses 1

II. The Trial 2

III. The Direct Appeal 6

IV. The Post-Conviction Proceedings 10

SUMMARY OF ARGUMENT 15

ARGUMENT 16

THE RULE SOUGHT BY RAMDASS WAS NOT DICTATED BY *SIMMONS* OR ANY CLEARLY ESTABLISHED PRECEDENT AT THE TIME HIS CASE BECAME FINAL 16

A. Ramdass' Claim 16

B. The Standard of Review 19

C. The Rule in *Simmons* 21

D. Virginia Law 29

E. The Virginia Supreme Court's Decision Was Not Contrary to Clearly Established Law 39

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Ake v. Oklahoma, 470 U.S. 68 (1995) 15

Bailey v. Alabama, 219 U.S. 219 (1911) 27

Bakery & Pastry Drivers & Helpers v. Wohl, 315 U.S. 769 (1942) 26

Blair v. Commonwealth, 66 Va. 850 (1874) 33

Brecht v. Abrahamson, 507 U.S. 619 (1993) 19

Brown v. Texas, 522 U.S. 940, 118 S.Ct. 354 (1997) 42

Butler v. McKellar, 494 U.S. 407 (1990) 42

Campbell v. Commonwealth, 431 S.E.2d 648 (Va. 1993) 35

Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999) 23

Collins v. New Hampshire, 171 U.S. 30 (1898) 27

Engle v. Isaac, 456 U.S. 107 (1982) 29

Estelle v. McGuire, 502 U.S. 62 (1991) 29

Gray v. Netherland, 518 U.S. 154 (1996) 21

Green v. French, 143 F.3d 865 (4th Cir. 1998) 20

Greenholtz v. Nebraska, 442 U.S. 1 (1979) 28

Griffin v. State, 983 S.W.2d 282 (Tex. Crim. App. 1998), *cert. denied*, 120 S.Ct. 77 (1999) 23

Gryger v. Burke, 334 U.S. 728 (1948) 29

Hawks v. Cox, 175 S.E.2d 271 (Va. 1970) 11

TABLE OF AUTHORITIES – Continued

Page

Henderson v. Mayor, 92 U.S. 259 (1875) 27

Hicks v. Feiock, 485 U.S. 624 (1988) 27

Hopkins v. Reeves, 524 U.S. 88 (1998) 29

In re Winship, 397 U.S. 358 (1970) 27

Ingram v. Zant, 26 F.3d 1047 (11th Cir. 1994) (per curiam), *cert. denied*, 513 U.S. 1167 (1995) 23

Lewis v. Jeffers, 497 U.S. 764 (1990) 29

Lindh v. Murphy, 521 U.S. 320 (1997) 19

Marks v. United States, 430 U.S. 188 (1977)..... 21

Memphis Steam Laundry Cleaners v. Stone, 342 U.S. 389 (1952) 27

Mickens v. Commonwealth, 457 S.E.2d 9 (Va. 1995) 33

Miller v. Johnson, 200 F.3d 274 (5th Cir. 2000)..... 23

Miranda v. Arizona, 384 U.S. 436 (1966)..... 24

Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998)..... 43

Mullaney v. Wilbur, 421 U.S. 684 (1975)..... 27

O'Dell v. Netherland, 521 U.S. 151 (1997)..... 21, 22, 42

Oken v. State, 681 A.2d 30 (Md. App. 1996) 24

Philpot v. State, 486 S.E.2d 158 (Ga. 1997), *cert. denied*, 522 U.S. 1054 (1998)..... 23

Railway Express Agency v. Virginia, 347 U.S. 359 (1954) 27

Ramdass v. Angelone, 28 F. Supp. 2d 343 (E.D. Va. 1998)..... 11

TABLE OF AUTHORITIES – Continued

Page

Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) 13

Ramdass v. Angelone, 120 S.Ct. 784 (2000)..... 15

Ramdass v. Commonwealth, 437 S.E.2d 566 (Va. 1993)..... 2

Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994)..... 8

Ramdass v. Virginia, 512 U.S. 1217 (1994) 7

Ramdass v. Virginia, 514 U.S. 1085 (1995) 10

Romano v. Oklahoma, 512 U.S. 1 (1994)..... 21

Simmons v. South Carolina, 512 U.S. 154 (1994)... *passim*

Smith v. Commonwealth, 113 S.E. 707 (Va. 1922) ...10, 31

Spencer v. Kemna, 523 U.S. 1 (1998)..... 24

State v. Bey, 736 A.2d 469 (N.J. 1999)..... 23

State v. Billings, 500 S.E.2d 423 (N.C.), *cert. denied*, 525 U.S. 1005 (1998)..... 23

State v. Bush, 942 S.W.2d 489 (Tenn.), *cert. denied*, 522 U.S. 953 (1997)..... 23

State v. Feaster, 716 A.2d 395 (N.J. 1998)..... 23

State v. Montez, 927 P.2d 64 (Ore. 1996), *cert. denied*, 519 U.S. 1079 (1997)..... 24

State v. Simpson, 479 S.E.2d 57 (S.C. 1996), *cert. denied*, 520 U.S. 1277 (1997)..... 23

State v. White, 709 N.E.2d 140 (Ohio), *cert. denied*, 120 S.Ct. 345 (1999) 23

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Keohane, 516 U.S. 99 (1995) 24

Teague v. Lane, 489 U.S. 288 (1989) 20

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999)..... 20

Terry Williams v. Taylor, No. 98-8384.....19, 20

STATUTES AND RULES

28 U.S.C. 2254(a) 24, 30

28 U.S.C. § 2254(d) ..... *passim*

Code of Virginia:

§ 19.2-264.4(C)..... 2

§ 19.2-264.5..... 5

§ 19.2-310 31

§ 19.2-317 35

§ 19.2-398 35

§ 19.2-398(B)..... 36

§ 53.1-20 31

§ 53.1-151(A) 39

§ 53.1-151(B)(1) ..... *passim*

§ 53.1-151(C) 39

Fed.R.Crim.P. 32(d)(1)..... 32

Rules of the Supreme Court of Virginia:

Rule 5:39..... 10

Rule 3A:15(b)..... 35

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Va. Const. Art. VI § 1 35

1996 Va. Acts c. 40 36

1996 Va. Acts c. 911 36

STATEMENT OF THE CASE

I. Ramdass' Offenses

Between August 25 and September 2, 1992, Bobby Ramdass and his gang engaged in a series of brutal armed robberies at five locations in Northern Virginia. On August 25, 1992, Ramdass and three accomplices robbed two persons at gunpoint at a Pizza Hut restaurant in Fairfax. During that robbery, one of the victims was abducted and the other was struck by Ramdass. (JA 17-18). On August 29, 1992, Ramdass and one accomplice entered the Bragg Tower apartment hotel in Alexandria and robbed Christopher Crissel, the clerk, at gunpoint. During that robbery, Ramdass struck Mr. Crissel in the jaw with his fist and then pistol-whipped him in the head. (JA 19-23).

On the afternoon of August 30, 1992, Ramdass and two accomplices robbed Emanuel Selassie, a taxicab driver in Arlington. After taking Mr. Selassie's money at gunpoint, Ramdass shot him in the head and left him for dead.[1] Later that same night, Ramdass committed another armed robbery of an employee in a Domino's Pizza restaurant in Alexandria. (JA 57-58).

Then, on September 2, 1992, Ramdass and four accomplices entered a 7-Eleven store in Fairfax where Ramdass proceeded to rob Mohammed Kayani, the clerk, at gunpoint and then shoot him in the head. Mr. Kayani

---

[1] Mr. Selassie miraculously survived after an extensive hospital stay during which he remained unconscious for two weeks and underwent major surgery. (JA 28, 41-45).

died as a result of massive bleeding. *See Ramdass v. Commonwealth*, 437 S.E.2d 566, 568-569 (Va. 1993). (JA 104-105).

II. The Trial

Ramdass was tried for the capital murder of Mr. Kayani by a jury in the Circuit Court of Fairfax County. The jury found Ramdass guilty on January 28, 1993, of capital murder during the commission of robbery and using a firearm in the commission of that offense. Ramdass pleaded guilty to the related charge of robbery. On January 29, 1993, in a separate sentencing hearing, the Commonwealth presented evidence of Ramdass' extensive criminal history and asked the jury to find that Ramdass "would constitute a continuing serious threat to society" under Virginia's "future dangerousness" aggravating factor and to sentence him to death. *See* Va. Code § 19.2-264.4(C).

As part of its sentencing case, the Commonwealth presented evidence of an unarmed robbery Ramdass had committed at the age of sixteen, as well as other juvenile offenses. (JA 12-15 and Tr. 1/29/93 at 22-25). It also presented evidence that Ramdass had been tried, convicted and sentenced for the Fairfax Pizza Hut robberies. (Tr. 1/29/93 at 31).

The Commonwealth presented the testimony of Mr. Crissel from the Bragg Tower robbery. On cross-examination, Ramdass brought out the fact that he had not yet been tried for that offense and that it was set for trial in Alexandria. (*Id.* at 42-43). The Commonwealth presented several witnesses involved in the attempted murder and

robbery of Mr. Selassie, the taxicab driver. (JA 23-45). Finally, the Commonwealth presented Ramdass' parole officer who testified that Ramdass' summer crime spree had occurred while he was still under parole supervision. (JA 46-47).

In its opening statement in the sentencing phase, the defense told the jury, without objection, that the evidence

> will show you that [Ramdass] will serve, right now before you impose a sentence, the next ninety-nine years of his life in jail for the sentences that have been imposed.
>
> It will show you that he is pending trial in Alexandria for the Fort Bragg apartment incident, robbery, for which as you've seen from all the other charges, will have him facing at least one life sentence and another four years.
>
> He has yet to be sentenced in the Domino Pizza robbery in Alexandria, of which he has been convicted. At least another life sentence.
>
> ***Bobbie Lee Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.***

(JA 49-50, emphasis added). Ramdass presented numerous witnesses, including his brother who testified about Ramdass' childhood, his run-ins with the authorities from the age of thirteen and his juvenile incarcerations. (Tr. 1/29/93 at 104 *et seq.*). Ramdass also called a parole officer to testify as to her investigation of Ramdass' background in connection with one of his earlier offenses. (*Id.* at 115 *et seq.*).

Bobby Ramdass testified on his own behalf, admitting his guilt in the capital murder, the Pizza Hut robberies, the Bragg Tower robbery, the taxicab driver's attempted murder and robbery, the Domino's Pizza robbery and other crimes. (JA 54-64). He told the jury that he had been sentenced to serve seventy-six years in prison for the Pizza Hut robberies in Fairfax and that an Alexandria jury had found him guilty of the Domino's Pizza robbery and had recommended an eighteen-year sentence, but that he had not yet been sentenced for that crime. (CA4 App. 136-137). He explained that he was scheduled to be tried the following month in Alexandria for the Bragg Tower robbery. (*Id.* at 157).[2]

At the conclusion of all the evidence, the jury was instructed on the law. (JA 76a-77). Ramdass did not request an instruction regarding his parole status. During the subsequent closing arguments, the defense argued that

> ***Bobbie Lee is going to jail for the rest of his life.*** The numbers have been run by you, ninety-nine plus years. There are cases in Court, matters still outstanding. . . . He should never see the light of day. . . . I ask you to give him life. Life, he will never see the light of day, but may you not take his life.

---

[2] Eight months after his Fairfax capital murder trial, Ramdass pleaded guilty in Alexandria to a murder he had committed on July 15, 1992. During the sentencing hearing on the Fairfax capital murder, the prosecutor cross-examined Ramdass regarding the Alexandria murder, but Ramdass denied any involvement. (JA 63-64). The prosecutor presented no evidence about that separate murder.

(JA 85, emphasis added). The prosecutor did not object to, comment on or challenge this defense argument in any way. The jury retired at 4:20 p.m. (JA 87). At 7:02 p.m., the jury sent out a written question: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (JA 88). Ramdass did not request an instruction that he would not be released on parole. Instead, he suggested that the court answer the question as follows:

> You must not concern yourself with matters that will occur after you impose your sentence, but you may impose [sic] that your sentence will be the legal sentence imposed in the case.

(JA 89). The court instead accepted the Commonwealth's suggestion that settled precedent from the Virginia Supreme Court required the following response taken from a Virginia model jury instruction:

> You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

(JA 91). After giving the instruction, the jury was excused for the night. It reconvened the following morning at 9:00 and, at 10:25 a.m., the jury returned with its verdict, fixing petitioner's sentence at death. (Tr. 1/30/93 at 3).

A post-verdict hearing was held on April 2, 1993. The court considered a probation officer's investigation of Ramdass' background "to the end that the court may be fully advised as to whether the sentence of death is appropriate and just." *See* Va. Code § 19.2-264.5. Ramdass presented testimony from his mother and from himself.

His attorneys argued that the judge should impose a life sentence because Ramdass never would be eligible for parole under Virginia Code § 53.1-151(B)(1). (JA 94). They also argued that they had spoken to three unnamed jurors who allegedly said they would have voted for a life sentence if they had known that Ramdass would have been ineligible for parole. (JA 95). The court sentenced Ramdass to death in accordance with the recommendation of the jury. The court also sentenced him to life imprisonment for the robbery and to four years in prison for the illegal use of a firearm. (JA 101).

III. The Direct Appeal

On appeal to the Virginia Supreme Court, Ramdass argued that his due process rights had been violated because the trial court had failed to instruct the jury that he would have been ineligible for parole. Ramdass recited Virginia's "three-time loser" parole statute, § 53.1-151(B)(1), and then noted that he had been convicted and sentenced on six separate robbery charges dating back to 1988.[3] (CA4 App. 168). He did not discuss when the convictions were imposed, whether they

[3] Section 53.1-151(B)(1) provided that,

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

qualified under § 53.1-151(B)(1), or when he became ineligible for parole.

On November 5, 1993, the Virginia Supreme Court affirmed the sentence of death in a unanimous opinion. (JA 102). Regarding the parole instruction argument, the Court ruled that "[w]e repeatedly have held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." (JA 117). The Court approved the standard response given by the trial court to the jury's question. (JA 118). In his petition for a writ of certiorari filed in this Court on March 15, 1994, Ramdass repeated the argument he had made in the Virginia Supreme Court. (Record No. 93-8309).

This Court had heard oral argument in *Simmons v. South Carolina*, 512 U.S. 154 (1994), on January 18, 1994. *Simmons* was decided on June 17, 1994, and, on June 20, 1994, this Court granted Ramdass' certiorari petition, vacated the judgment of the Virginia Supreme Court and remanded the case for reconsideration in light of *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217 (1994). (JA 121).

On remand, the Virginia Supreme Court ordered further briefing and oral argument. Ramdass argued that *Simmons* required vacatur of his sentence because he was ineligible for parole. According to Ramdass, he was ineligible for parole under § 53.1-151(B)(1) because, prior to his capital murder trial, he had been convicted in 1988 of robbery and on January 22, 1993, of the Pizza Hut robberies. (JA 123-124). The Commonwealth argued in response that Ramdass was not ineligible for parole at the time of his capital murder trial and could not have been

rendered parole ineligible by a life sentence for the capital murder. The Commonwealth explained that the 1988 robbery did not qualify under § 53.1-151(B)(1) because it involved no deadly weapon and that the first qualifying conviction under § 53.1-151(B)(1) was the Pizza Hut robberies which were part of "a common act, transaction or scheme" and for which Ramdass had been sentenced. The Commonwealth also explained that the capital conviction could have counted only as the second of the three convictions required for ineligibility under § 53.1-151(B)(1). Therefore, if on January 30, 1993, Ramdass' jury had imposed a life sentence, Ramdass would not have been ineligible for parole under § 53.1-151(B)(1). Finally, the Commonwealth explained that, if given a life sentence for the capital crime, Ramdass would not have been rendered ineligible for parole until the third qualifying conviction was imposed on February 18, 1993, for the Domino's Pizza robbery, ***after the capital jury had rendered its sentencing verdict***. (CA4 App. 193-195).

Ramdass did not dispute the Commonwealth's fact-based argument, although the Virginia Supreme Court's briefing order expressly had allowed for a reply. (*Id.* at 182). The Virginia Supreme Court rendered its unanimous opinion on November 4, 1994. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994). (JA 128). The Court ruled as follows:

> In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2198. Hence, *Simmons* applies

only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1-151(B) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass' penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B)(1). They were:

(1) Ramdass' January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B)(1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B)(1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under

> Code § 53.1-151(B)(1). *See Smith v. Commonwealth*, 134 Va. 589, 592-593, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

(JA 129-131).[4]

Ramdass did not petition the Virginia Supreme Court for rehearing. *See* Rule 5:39, Rules of the Supreme Court of Virginia (allowing such petitions). Ramdass instead filed a petition for a writ of certiorari in this Court in which he argued for the first time that the Virginia Supreme Court had misapplied Virginia law in determining that he was not ineligible for parole. (JA 133-138). This Court denied the petition on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

IV. The Post-Conviction Proceedings

In his state habeas corpus petition filed in the Virginia Supreme Court, Ramdass repeated the argument he had made on direct appeal. He did not challenge the Virginia Supreme Court's determination of parole eligibility under § 53.1-151(B)(1). (JA 146-148). The Virginia

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[4] A chart summarizing Ramdass' offenses by description and date of trial and judgment appears in Appendix A.

Supreme Court dismissed the petition on March 18, 1996, and refused to relitigate the issue under its rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970) (absent change in circumstances, a previous determination of issue is conclusive). (JA 151).

Ramdass' federal habeas petition was filed on February 14, 1997, in the United States District Court for the Eastern District of Virginia in Norfolk. Ramdass challenged the Virginia Supreme Court's eligibility determination on a number of bases, but primarily on the grounds that the state court allegedly had misinterpreted and misapplied Virginia law and had no authority in the first place to determine his eligibility. (JA 162-167). Ramdass also argued that the Virginia Supreme Court's ruling was arbitrary and that *Simmons* required relief even if he was eligible for parole as determined by the Virginia Supreme Court; however, he never proffered an instruction regarding his parole status that he believed should have been given to the jury. (JA 167-168). A magistrate judge recommended that the writ be granted on the basis that the Virginia Supreme Court had erred in its determination of Virginia law (JA 299-303) and that *Simmons* was not "limited to the very narrow issue of specific parole eligibility or lack thereof." (JA 304).

The district court judge subsequently found Ramdass' claim of "arbitrary" action by the Virginia Supreme Court procedurally barred because it had not been raised in state court. *Ramdass v. Angelone*, 28 F. Supp. 2d 343, 356-357 (E.D. Va. 1998). (JA 333). He otherwise agreed with the magistrate judge, however, and directed that the writ issue on the grounds that the Virginia Supreme Court had "contradicted more than one hundred years of

Virginia law" (JA 350-351) and that, in any event, relief was warranted because, despite Ramdass' parole eligibility status under § 53.1-151(B)(1), "the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole." (JA 362). The district court concluded that the Virginia Supreme Court's decision was an unreasonable application of clearly established law and an unreasonable determination of the facts under 28 U.S.C. § 2254(d). (JA 363).

On the Director's appeal to the United States Court of Appeals for the Fourth Circuit, Ramdass argued that this Court had not conditioned its rule in *Simmons* on a state's determination of parole ineligibility "at the moment of sentencing." (Brief of Petitioner, CA4 No. 98-30, 2/22/99, at 16). He argued that *Simmons* looked rather to "the functional and common-sense possibility of parole." (*Id.*). He also argued that, contrary to the Virginia Supreme Court's express interpretation of Virginia law, § 53.1-151(B)(1) did not require that he be sentenced on three qualifying convictions in order to be rendered ineligible, but merely that he have been ***found guilty*** on three qualifying offenses. (*Id.* at 20-21, n.9). Finally, he argued that it was unfair to conclude that he was not entitled to a no-parole instruction even if he was not ineligible for parole at the time of his capital sentencing because he ***would become*** ineligible "three short weeks thereafter," and because he "inevitably ***would reach*** a point where he could never be considered for release." (*Id.* at 23, emphasis added). Again, however, Ramdass did not articulate what be believed the jury should have been instructed on the matter.

A three-judge panel of the Fourth Circuit reversed the district court's erroneous decision to grant the writ. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999). (JA 380). It held first that *Simmons* requires a determination of whether the defendant is eligible for parole and that such determination is a matter of state law, rather than the federal issue defined by Ramdass as a "nonlegalistic 'commonsense impossibility of parole.' " (JA 396-398). Second, the Court of Appeals held that Ramdass' nebulous standard for determining parole was contrary to Fourth Circuit precedent. (JA 398). Third, it held that, "as a matter of simple logic," ***any*** determination of a state prisoner's parole eligibility has no meaning beyond what state law dictates. (JA 399).

Fourth, the Court of Appeals held that Ramdass' proposed "standard" was not "clearly established" under § 2254(d)(1), and also ran afoul of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), because it asked for an extension of what *Simmons* requires. (JA 399-400). Finally, the Fourth Circuit held that Ramdass' "insinuation" that the Virginia Supreme Court had "acted craftily in denying his *Simmons* claim" was completely unfounded: the Virginia rule that a conviction cannot count for parole eligibility purposes unless and until a final sentencing order has been entered comports with the "age-old rationale" that before negative consequences (such as parole ineligibility) may be imposed based upon a conviction, a defendant is accorded added protection by a definition of "conviction" limited to orders which actually have been entered. (JA 401-403). In Ramdass' case, the Fourth Circuit accurately observed that the random order in which his trials and sentencing proceedings had

taken place was entirely foreseeable, given the fact that he had committed so many felonies in such a short period of time. (JA 401).

Fourth Circuit Judge Murnaghan dissented on the *Simmons* issue because, even though Ramdass was eligible for parole – and properly found to be so by the Virginia Supreme Court (JA 414) – it was, in his opinion, a "practical reality" that Ramdass would be parole ineligible "upon entry of the Kayani [capital murder] conviction." (JA 415). Under Judge Murnaghan's erroneous interpretation of Virginia law, moreover, entry of the Domino's Pizza conviction – the third qualifying conviction under § 53.1-151(B)(1) – was nothing more than a "ministerial act" mandated by state law. (*Id.*). Thus, according to Judge Murnaghan and squarely contrary to what the Virginia Supreme Court had ruled, it made no difference to the application of § 53.1-151(B)(1) that the judgment in the Domino's Pizza case had not actually been entered at the time Ramdass' capital sentencing jury asked its question about parole eligibility.

In his petition for rehearing filed in the Fourth Circuit, Ramdass adopted Judge Murnaghan's argument and, for the first time, expressly abandoned his other arguments that supposedly demonstrated how the Virginia Supreme Court had erred in its interpretation of Virginia law. (JA 425 n.2). The Fourth Circuit denied both the petition for rehearing and the petition for rehearing *en banc*. (JA 429-430).

In his petition for a writ of certiorari, Ramdass contended that the Fourth Circuit had erred in ruling that *Simmons* was limited by the state court's determination of

parole eligibility, in ruling that he was denied no right under *Ake v. Oklahoma*, 470 U.S. 68 (1995), and in its application of § 2254(d). This Court granted certiorari but limited its review to the *Simmons* issue alone. *Ramdass v. Angelone*, 120 S.Ct. 784 (2000).

SUMMARY OF ARGUMENT

In *Simmons*, this Court created a new rule of criminal procedure by which a defendant in a capital murder case is entitled to answer the State's argument for a finding of future dangerousness by informing the jury that a life sentence will render him ineligible for parole as a matter of state law. In Ramdass' case, the Virginia Supreme Court held that, under Virginia Code § 53.1-151(B)(1), a defendant must have three or more qualifying convictions before losing parole eligibility and that a "conviction" for purposes of the statute means a conviction upon which final judgment has been entered by the trial court.

At the time Ramdass' capital jury was deciding whether to return a sentencing verdict of life or death, Ramdass had been convicted of only one offense qualifying under § 53.1-151(B)(1) and upon which a final judgment had been entered. The Virginia Supreme Court held that Ramdass' sentence for capital murder thus could count only as a second qualifying conviction under § 53.1-151(B)(1). It further held that a third offense upon which a verdict of guilt had been rendered, but upon which a final judgment had not been entered at the time of the capital sentencing, did not qualify at the time of the capital sentencing as a conviction for purposes of the

state statute. The Virginia Supreme Court therefore held that Ramdass was not entitled under *Simmons* to provide inaccurate information to the jury that a life sentence would render him ineligible for parole.

Ramdass claims now that the rule in *Simmons* does not depend upon the state court's characterization of a defendant's parole eligibility status and that a federal court on collateral review may find, under a "functional" view of parole eligibility, that a defendant was in fact ineligible for parole despite the state court's ruling to the contrary. Ramdass' claim, however, is an impermissible request for an extension of *Simmons* that was neither clearly established nor compelled by *Simmons*. The rule he seeks thus is prohibited by both 28 U.S.C. § 2254(d)(1) and by this Court's "new rule" doctrine.

ARGUMENT

THE RULE SOUGHT BY RAMDASS WAS NOT DICTATED BY *SIMMONS* OR ANY CLEARLY ESTABLISHED PRECEDENT AT THE TIME HIS CASE BECAME FINAL.

A. Ramdass' Claim

Ramdass always has conceded that, in order for him to prevail under *Simmons*, he must demonstrate his parole ineligibility. After the Virginia Supreme Court determined in 1994 that Ramdass was not entitled to relief under *Simmons* because he could not have been rendered parole ineligible by a life sentence for the capital murder, Ramdass argued that the Virginia Supreme Court's parole eligibility determination was a mistake.

At some point during his federal collateral case, however, he recognized that his challenge to the Virginia Supreme Court's determination of state law could not result in federal collateral relief. He changed his approach and asked the federal courts instead to reinterpret *Simmons* so as to afford him relief. Because he was faced with the plain language of *Simmons* that clearly predicates relief upon a determination of parole ineligibility under state law, Ramdass asked for a ruling that would redefine ineligibility as a "common-sense impossibility of parole" without regard to, and even in defiance of, the state court's express contrary determination of eligibility under state law.

It is important to understand the scope of Ramdass' claim. He is asking that federal habeas courts be authorized to determine parole eligibility *de novo*, and even to determine a matter of state law contrary to the highest state court. Under the facts of his case, however, the effect of granting his request would be to create a new right by which a capital defendant in a future dangerousness case would be entitled to inform his sentencing jury, not just that a life sentence will render him ineligible for parole, but also, under some "common sense" theory, about "any possibility that he could be released on parole in the future." (Pet. Br. at 47).

To be precise, Ramdass claims that *Simmons* entitled him to inform his sentencing jury of hypothetical future developments which, under Virginia law, would render

him ineligible for parole if they occurred.[5] Ramdass urges that, because one of those hypotheticals later came to fruition in his case, he is ***now*** entitled to the benefits under *Simmons* which would have existed if the hypothetical had occurred prior to his capital sentencing proceeding. He asserts nothing less than that he was entitled to tell his jury something that ***might*** occur simply because it ***did*** occur later.

In the truest sense, he is claiming, not that he was denied the right to tell his jury ***accurate*** information, but rather that he was denied an opportunity to impart ***false*** information. Ramdass' jury already had been informed of all accurate information: it knew that Ramdass had been sentenced for the Pizza Hut robberies to seventy-six years, that a jury had recommended an eighteen-year sentence for the Domino's Pizza robbery and that he had not yet been tried for the Bragg Towers and taxicab driver robberies. It also knew – because defense counsel told it so – that Ramdass would spend the rest of his life in prison as a result of all the sentences he would receive. (JA 49-50, 85). What Ramdass now says he should have been allowed to argue – that he would be ineligible for parole on his capital murder conviction – simply was not the truth.[6] Moreover, it is an obvious extension of the rule

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[5] See discussion below at pages 34-36, regarding Ramdass' mischaracterization of the Domino's Pizza conviction as "inexorable" under Virginia law.

[6] Because the jury had before it all the facts regarding Ramdass' other sentences and pending trials for the other offenses, and because defense counsel was allowed to tell the jury, without objection or rebuttal by the Commonwealth, that his sentences would result in him spending the rest of his life in prison, Ramdass cannot demonstrate the actual prejudice necessary to a grant of federal habeas corpus relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (error must have "had substantial and injurious effect or influence in determining the jury's verdict").

in *Simmons* and therefore forbidden by the statutory standard of review that governs this collateral case.

B. The Standard of Review

Ramdass does not dispute that the standard of review governing his claim is mandated by 28 U.S.C. § 2254(d).[7] In *Lindh v. Murphy*, 521 U.S. 320, 334 (1997), this Court observed that § 2254(d) provides a "highly deferential standard for evaluating state court rulings." In *Terry Williams v. Taylor*, No. 98-8384, this Court presently is considering the interpretation of § 2254(d)(1). In *Williams*, the Warden has argued that § 2254(d)(1) abolished *de novo* review by federal courts unless the state court decision was patently unreasonable. In order to obtain relief under § 2254(d)(1), the prisoner must show either that the state court failed to select and apply a clearly established federal law, *i.e.*, the decision was "contrary to . . . ," or that the state court's adjudication of mixed questions of law and fact was so unreasonable that all reasonable jurists would have felt compelled to rule in the prisoner's favor, *i.e.*, the decision was an "unreasonable application. . . . " (See No. 98-8384, Resp. Br. at 25-30). Williams has argued that § 2254(d)(1) preserves *de*

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[7] His federal § 2254 petition was filed on February 14, 1997, making the provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), including § 2254(d), applicable to his case. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

novo review and simply codifies this Court's "new rule" doctrine under *Teague*. (See No. 98-8384, Pet. Br. at 35).

The Fourth Circuit's judgment in Ramdass' case encompasses both interpretations of the statute which are currently under review in *Williams*.[8] Regarding § 2254(d)(1), the Fourth Circuit held,

> [t]his statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal habeas law." *Green v. French*, 143 F.3d 865, 873 (4th Cir. 1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague*. . . . In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n.9 (4th Cir. 1999). . . . Thus, either under *Teague* or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail.

(JA 399-400). Whether Ramdass' case is reviewed under a "stricter than *Teague*" view of § 2254(d)(1) or under Williams' "*Teague* as is" view of § 2254(d)(1), the forthcoming decision in *Williams* can have no significant effect on the Fourth Circuit's judgment.

Pursuant to the language of § 2254(d)(1), a writ of habeas corpus "shall not be granted" to Ramdass unless the Virginia Supreme Court's adjudication of his *Simmons* claim "resulted in a decision that was contrary to, or

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[8] Ramdass does not challenge the Fourth Circuit's definition of the governing standard.

involved an unreasonable application of, clearly established Federal law, as determined by [this] Court."[9] Pursuant to the "new rule" doctrine, habeas relief may not be granted unless it can be said that the Virginia Supreme Court acted objectively unreasonably by not extending to Ramdass relief under *Simmons*, *see O'Dell v. Netherland*, 521 U.S. 151, 156 (1997), or, put another way, that the Virginia Supreme Court was compelled by *Simmons* to rule in Ramdass' favor. *See Gray v. Netherland*, 518 U.S. 152, 166 (1996). Examination of this Court's decision in *Simmons*, however, makes clear that, as the Fourth Circuit found, the rule Ramdass seeks was neither "clearly established" under § 2254(d) nor "compelled" under the "new rule" doctrine.

C. The Rule in *Simmons*

The language in both the *Simmons* plurality opinion and in Justice O'Connor's concurring opinion[10] could not

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[9] Section 2254(d)(2) also allows relief where the petitioner demonstrates that the state court decision was based upon an unreasonable determination of the facts. The district court based its decision to grant relief on both (d)(1) and (d)(2). However, as the Fourth Circuit explained, "the parole eligibility determination is a question of law, not fact." (JA 400). Indeed, the facts relevant to the parole eligibility determination never have been in dispute and Ramdass has abandoned any argument now that he is entitled to relief under § 2254(d)(2). That subsection thus is inapplicable to this case.

[10] As Justice O'Connor supplied the necessary fifth vote and concurred on grounds narrower than those of the plurality, her concurrence is the controlling opinion. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), *citing Marks v. United States*, 430 U.S. 188, 193 (1977).

be more explicit. Application of the "new rule" this Court created in *Simmons*, *see O'Dell*, 521 U.S. at 166, was preconditioned on two factors: (1) the prosecution must have argued for the death penalty based upon the defendant's "future dangerousness;" and (2) the defendant must be rendered ineligible for parole by a life sentence. The only factor at issue in Ramdass' case is the latter: Ramdass argues that parole eligibility is not limited by what the state court says it is.

The language used in both the plurality and concurring opinions of *Simmons*, however, simply forecloses Ramdass' contention. *See Simmons*, 512 U.S. at 156 (plurality opinion) (limiting holding to cases where "state law prohibits the defendant's release on parole"); *id.* at 158 (noting that South Carolina officials had testified that "any offender in petitioner's position was in fact ineligible for parole under South Carolina law"); *id.* at 162 (noting that Simmons had asked three times "to inform the jury that in fact he was ineligible for parole under state laws"); *id.* at 165 (defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was legally ineligible for parole"); *id.* at 165 n.5 (defendant entitled to rebut future dangerousness "with the fact that he is ineligible for parole under state law"); *id.* at 166 (noting that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate"); *id.* at 167 n.7 (reciting statutory law from thirty-seven States regarding rules governing parole eligibility and right to inform jury); *id.* at 168 (stating that, "[i]n a State in which parole is available" the defendant has no right

to inform the jury); *see also id.* at 176 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that "the only available alternative sentence . . . was life . . . without the possibility of parole"); *id.* ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact"); *id.* at 178 ("the only alternative . . . under state law was life . . . without possibility of parole").[11]

Indeed, this unmistakably clear language has led numerous courts to conclude exactly as the Fourth Circuit has concluded: *Simmons* does not extend to cases in which the defendant would be eligible for parole upon a life sentence ***under state law***. *See, e.g., Miller v. Johnson*, 200 F.3d 274, 290-291 (5th Cir. 2000); *Coe v. Bell*, 161 F.3d 320, 346 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999); *Ingram v. Zant*, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994) (per curiam), *cert. denied*, 513 U.S. 1167 (1995); *State v. Bey*, 736 A.2d 469, 502 (N.J. 1999); *State v. White*, 709 N.E.2d 140, 156 (Ohio), *cert. denied*, 120 S.Ct. 345 (1999); *State v. Billings*, 500 S.E.2d 423, 427 (N.C.), *cert. denied*, 525 U.S. 1005 (1998); *State v. Feaster*, 716 A.2d 395, 441 (N.J. 1998); *Griffith v. State*, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998), *cert. denied*, 120 S.Ct. 77 (1999); *State v. Bush*, 942 S.W.2d 489, 503 (Tenn.), *cert. denied*, 522 U.S. 953 (1997); *Philpot v. State*, 486 S.E.2d 158, 160 (Ga. 1997), *cert. denied*, 522 U.S. 1054 (1998); *State v. Simpson*, 479 S.E.2d 57, 61

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[11] Ramdass asserts that the Fourth Circuit incorrectly "assum[ed] that [state law] circumscribe[s] the federal right." (Pet. Br. at 19). As demonstrated in the text, however, it was *Simmons* itself that defined the federal right in terms of a status created by state law.

(S.C. 1996), *cert. denied*, 520 U.S. 1277 (1997); *Oken v. State*, 681 A.2d 30, 41 (Md. App. 1996); *State v. Montez*, 927 P.2d 64, 74 (Ore. 1996), *cert. denied*, 519 U.S. 1079 (1997).

Nothing in *Simmons* supports an argument allowing a federal habeas court to decide *de novo* the state law issue of whether a defendant will be made ineligible for parole by a life sentence or, as here, to redetermine the eligibility issue contrary to the express ruling of the state supreme court. Ramdass does not cite any authority that supports his novel theory. Instead, he attempts to evade the clear import of *Simmons* by reference to cases which, not only have nothing to do with the particular rule in *Simmons*, § 2254(d) or the "new rule" doctrine, but which are wholly inapposite on any level.[12]

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[12] Ramdass' "custody" analogy, for example, is irrelevant to the rule in *Simmons*. In *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases, this Court has defined the familiar rule requiring specific warnings prior to police initiated custodial questioning as applying when a reasonable person would feel he was not free to leave, and has held the issue of "custody" to be a federal question of mixed fact and law. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). That rule obviously has no connection, in principle or application, to the issue of whether a federal court may redetermine state parole law for the purpose of instructing a state court capital sentencing jury. Even further removed from the present case is the interpretation of the "in custody" provision of § 2254(a). That term has been broadly construed by this Court so as to give federal courts jurisdiction over habeas petitions filed by state prisoners; it never has been circumscribed by state law. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

As an initial matter, the reason Ramdass' analogies fail is that his underlying premise is simply wrong. Contrary to his contention, the rule in *Simmons* is not one involving "federal law [that] overlays state laws," depending "on the operational consequences of state-law rules, not on the characterization that a state court or legislature puts on those rules." (Pet. Br. at 28). As the above-cited passages from *Simmons* make clear, it is precisely the defendant's legal status ***under state law*** that triggers the due process right to inform the jury. That due process right is wholly dependent upon how state law defines the prisoner's parole eligibility status, as plainly expressed repeatedly in both the plurality and concurring opinions of *Simmons*.

Moreover, the Fourth Circuit accurately observed that,

> as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

(JA 399). Put another way, *Simmons* recognized that parole eligibility can have no meaning outside of what state law says it means. Whether thought of in terms of "practical," "functional" or "technical," an inmate is either eligible for parole or he is not. Whether looked at as a definitional or result-oriented matter, the "operational consequences" of state parole eligibility law are absolutely equivalent to its "characterization" by the

state court. There are no gray areas of parole eligibility: the inmate's sentence or sentences either render him ineligible for parole under state law or they do not.

Indeed, were the rule in *Simmons* somehow divorced from the defendant's parole eligibility under state law, it would have no workable meaning at all, much less any practical means by which it could be applied or even reviewed. If, as *Simmons* holds, a defendant may inform his jury that a life sentence will render him ineligible for parole, then state law must determine whether the defendant would be ineligible and, therefore, whether the *Simmons* rule applies.[13]

Furthermore, Ramdass' collection of cases involves the wholly irrelevant issue of whether a state law itself violates the Constitution.[14] Ramdass, however, never has

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[13] Ramdass suggests that constitutional error occurred because the jury's exact question was not answered. (Pet. Br. at 27). The right created in *Simmons*, however, is not dictated by whether or what a jury asks; rather, it narrowly defines the parameters of what information a court must allow to be imparted to the jury about parole by way of rebuttal: if the defendant requests, the jury must be informed that a life sentence will result in parole ineligibility. A jury may have many legitimate concerns, *e.g.*, whether there is generally a possibility of release, whether the sentence may be commuted, whether the defendant will be held in a maximum security center, whether he will have contact with visitors, whether he will have access to weapons, etc. However, the only information regarding post-conviction procedures that this Court has mandated must be imparted to the jury is, where applicable, parole ineligibility.

[14] *Bakery & Pastry Drivers & Helpers v. Wohl*, 315 U.S. 769 (1942), a First Amendment case, reversed a state court ruling

challenged the constitutionality of the Virginia parole eligibility statute or the Virginia Supreme Court's parole eligibility determination. (Pet. Br. at 20: "Virginia can define [its statute] however it wishes, and Ramdass will have no federal basis for complaint"). Under *Simmons*, a State is free either to provide or prohibit parole eligibility for inmates, as well as to define by statute the factors triggering ineligibility. Certainly nothing in *Simmons* curtails the State's right to qualify or disqualify an inmate for parole eligibility. Indeed, unlike the cases cited by

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that no First Amendment rights attached unless there was a labor dispute. *Bailey v. Alabama*, 219 U.S. 219 (1911), a direct appeal case, invalidated under the Thirteenth Amendment a state statute that made criminal the failure to pay a debt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975), a pre-"new rule" federal habeas case, held that, under *In re Winship*, 397 U.S. 358 (1970), a state may not place the burden of proof of lack of malice upon the defendant, even if malice is not an element of the crime under state law. *Hicks v. Feiock*, 485 U.S. 624 (1988), simply remanded a contempt conviction to state court to determine whether the proceeding was criminal or civil and to vacate the conviction as a result of a burden-shifting presumption only if found to be criminal. *Memphis Steam Laundry Cleaners v. Stone*, 342 U.S. 389 (1952), a Commerce Clause case, found a state tax discriminated against interstate commerce under any definition of the tax. *Railway Express Agency v. Virginia*, 347 U.S. 359, 369 (1954), another Commerce Clause case, likewise found a state tax to be an impermissible "privilege" tax, partly because the state legislature had so labeled it. *Henderson v. Mayor*, 92 U.S. 259 (1875), yet another Commerce Clause case, held that a New York law imposing a fee for each foreign passenger arriving there was a tax in contravention of free commerce. *Collins v. New Hampshire*, 171 U.S. 30 (1898), still another Commerce Clause case, struck down a state law making it a crime to sell oleomargarine unless colored pink because the law was, in effect, a prohibition on the sale of oleomargarine.

Ramdass in which state laws conflicted with specific constitutional provisions, a determination of parole eligibility does not conflict with, or even implicate, the Constitution. *See Greenholtz v. Nebraska*, 442 U.S. 1, 7 (1979) (the Constitution creates no liberty interest in discretionary parole). A State's law establishing parole eligibility or ineligibility cannot result in the denial of due process articulated in *Simmons* because the due process right is itself defined by the state law governing eligibility.

Simmons, of course, discusses at length the wide variety of state statutes governing parole eligibility. *See Simmons*, 512 U.S. at 167 n.7 (plurality opinion). The Virginia Supreme Court applied its own statute and ruled that Ramdass could not have informed his jury that he would be rendered ineligible on a capital murder conviction precisely because that conviction would not have rendered him ineligible under § 53.1-151(B)(1). The Virginia Supreme Court's ruling certainly did not impugn any constitutional provision.

Simmons specifically contemplated the result obtained here: "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact." *Simmons*, 512 U.S. at 176 (O'Connor, J., concurring); *accord* 512 U.S. at 168 (plurality opinion). It thus expressly conditioned its new due process rule upon a determination under ***state law*** of parole ineligibility. Because the Virginia Supreme Court authoritatively determined that Ramdass would not have been ineligible for parole under Virginia law, the rule in *Simmons* simply affords him no relief.

D. Virginia Law

Ramdass admits, as he must under the clear language of *Simmons*, that state law determines his parole eligibility status. According to his theory, however, there are two kinds of state law: one determined by the state supreme court and another determined by a federal court. As his argument goes, the Virginia Supreme Court was free to find what the "technical" law was, but only the federal court may define the "real" state law for purposes of *Simmons*. In the final analysis, Ramdass' novel theory is nothing more than a surreptitious attempt to demonstrate the impossible: that the Virginia Supreme Court was wrong on a matter of Virginia law.[15] This, of course, contravenes decades of settled precedent holding that state courts are the sole and final arbiters of state law. *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 94-101 (1998); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Gryger v. Burke*, 334 U.S. 728, 731 (1948).

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[15] The Fourth Circuit accurately observed that Ramdass never contested the Virginia Supreme Court's parole eligibility determination in state court. (JA 390). However, because Ramdass had made "the broader, more basic claim" of *Simmons* error in state court, the Fourth Circuit rejected the respondent's default argument. (*Id.*). Ramdass no longer directly contests the validity of the Virginia Supreme Court's determination, but rather argues indirectly that a federal court is free to find parole eligibility under his nebulous theory of "functional and common sense ineligibility."

As the Fourth Circuit aptly held,

> The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court ***only*** on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

(JA 401).[16] The Fourth Circuit went on to make clear, however, that, even if it could reinterpret Virginia law, it "would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim." (*Id.*).

The Court of Appeals' analysis unquestionably was correct. The Virginia Supreme Court interpreted Virginia Code § 53.1-151(B)(1) in a straightforward manner: before an inmate can be disqualified from parole eligibility, he

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[16] Unquestionably, the gravest error committed by both the magistrate judge and the district court was the unprecedented holding that a federal court was empowered to overrule a state supreme court on a matter of state parole law based on the mistaken view that the Virginia Supreme Court had "contradicted more than one hundred years of Virginia law." (JA 350-351).

must have three convictions for separate offenses of murder, rape or armed robbery and the convictions may not be considered unless and until final judgment has been entered. (JA 130-131). The state court ruled that Ramdass would not have been disqualified from parole eligibility by a life sentence for capital murder because that offense only could have counted as the second qualifying conviction under the statute. (JA 130). It further held that, under *Smith v. Commonwealth*, 113 S.E. 707, 709 (Va. 1922), a "conviction" means the entry of final judgment. Thus, the Domino's Pizza guilty verdict could not count as one of the three required convictions because no final judgment had been entered at the time Ramdass' capital jury was deciding what sentence to impose. (JA 131).

This ruling was beyond reproach. No Virginia prison or prison official may exert any control over any person until that person has been both convicted of a felony and sentenced to serve at least one year in prison. Va. Code § 53.1-20 (custody over persons convicted of felony and sentenced to a year or more); § 19.2-310 (persons not transferred to prison until sentenced by court).[17] Moreover, as the Fourth Circuit observed,

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[17] It is only capital murder defendants who ever will want to expedite the finding of parole ineligibility to the earliest possible time. Only such defendants can hope to obtain perverse benefit from the State's determination that, by virtue of repeated and violent crimes, the defendant is too dangerous ever to be released on parole. The vast majority of a State's inmates will seek to stave off a finding of parole ineligibility to the last possible moment. The Virginia Supreme Court is charged with interpreting state law which is equally applicable to all inmates, not just capital felons.

Sound reasoning supports *Smith*'s holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith*'s factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment – even if it appears to be only a formal step of the process – in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural protection against unfairness or corruption.

* * *

As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the *Smith* definition of conviction is appropriate, or even necessary. Upon amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury.

(JA 402-403).[18]

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[18] Despite the district court's finding that Ramdass' "arbitrary Virginia Supreme Court" claim was defaulted (JA 333), the Fourth Circuit rejected it on the merits "only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim." (JA 403; see also Pet. Br. at 27: "The Virginia Supreme Court's . . . avoidance of the rule in *Simmons* . . . leaves an important federal due process right subject to . . . manipulable state-court characterizations of state law"). As the Court of Appeals noted, such an argument also is defeated by the fact that, in a contemporaneous case, the Virginia Supreme Court had vacated the inmate's death sentence and remanded for resentencing because it found the inmate to have been parole ineligible and thus entitled to a *Simmons* instruction. (JA 403). *See Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Significantly, Ramdass no longer relies upon Virginia case law that he cited in the Fourth Circuit. That case law, as it turned out, actually proved that ***over one hundred years ago*** the Virginia Supreme Court had recognized that the word "convict," when used in statutes relating to prisons, meant "adjudged guilty of felony by the ***final judgment*** of the Court." *See Blair v. Commonwealth*, 66 Va. 850, 858 (1874) (emphasis added).

Ramdass, however, urges this Court to find as follows: even though state law requires a final sentencing order before the conviction can count towards parole ineligibility and, even though the Domino's Pizza case had no final sentencing order yet entered, it makes no sense to count the Pizza Hut conviction and not the Domino's Pizza verdict because they both had the same chance of being set aside by the trial judges under a Rule of Court. (Pet. Br. at 37-38). As if this remarkable illogic were not enough, Ramdass then simply misstates the record by arguing that the Virginia Supreme Court "recognized" this "setting aside" theory, "dismissed" it as a "hypothetical future development" and yet inconsistently accepted it with respect to the Domino's Pizza verdict. (*Id.* at 38).[19]

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[19] The district court carried this illogical reasoning even further, finding as Ramdass had argued in that court that there was "no logical reason" why the Virginia Supreme Court would count the ***capital murder*** conviction as one of the three necessary strikes while not counting the Domino's Pizza

Whatever Ramdass means by setting up this straw-man, what is clear is that it played no part in the Virginia Supreme Court's decision. The "setting aside" argument was neither made nor considered in state court. The Virginia Supreme Court's decision was based solely upon the state law determination that § 53.1-151(B)(1) allows consideration of convictions upon which judgment has been entered, but does not allow consideration of convictions upon which no judgment has been entered. Whether or not such a judgment may be overturned or set aside ***afterwards*** is completely irrelevant to the issue of whether it may be counted in the first place under § 53.1-151(B)(1). Final sentencing is the *sine qua non* of Virginia's parole eligibility statute. Without a final sentencing order, the offense cannot disentitle an inmate to parole eligibility.

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robbery. (JA 357). Ramdass appears to have dropped this nonsensical argument in favor of Judge Murnaghan's equally weak reasoning in his dissent. (JA 415). Obviously, the capital murder must be counted as if final judgment had been entered because the essence of a *Simmons* instruction is to inform the jury with certainty as to what will occur if the jury imposes a life sentence and that becomes the judgment. Just as obvious, however, is the fact that the reason the Pizza Hut convictions count and the Domino's Pizza verdict did not was because, as the Virginia Supreme Court held, a judgment had been entered on the former and not the latter. Under the defective reasoning of Judge Murnaghan, the district court and Ramdass, ***no*** conviction could count under § 53.1-151(B)(1) as long as it was subject to any form of reversal, *e.g.*, motion for new trial, appellate or habeas review. Of course, such is not the case: the Virginia Supreme Court simply and reasonably held that the point at which a conviction may count towards parole ineligibility is when the final judgment has been entered.

Ramdass' view of Virginia law, while irrelevant to the validity of state law as authoritatively explicated by the Virginia Supreme Court, nevertheless is dead wrong. Ramdass contends repeatedly that the Domino's Pizza final judgment was "foreseeable, imminent and inexorable." He mischaracterizes the entry of that judgment as a "ministerial act," a mere "formality" or "technicality." Nothing could be further from the truth.

At the time the Fairfax jury was deciding whether to sentence Ramdass to death on January 30, 1993, Ramdass was awaiting sentencing on the Alexandria Domino's Pizza case. State law clearly gave the Alexandria judge the unfettered authority to set aside the guilty verdict under Virginia Supreme Court Rule 3A:15(b), a fact Ramdass concedes. (Pet. Br. at 17 n.5). Indeed, in Virginia, a trial judge is vested with the total – and unreviewable – discretion to set aside a jury's verdict. A decision to acquit or vacate is not appealable or subject to mandamus: the Commonwealth is without a remedy to challenge such a decision in any way. *See* Va. Const. Art. VI § 1 ("no appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person"); *Campbell v. Commonwealth*, 431 S.E.2d 648, 655 (Va. 1993) (noting that no appeal by Commonwealth permitted in a criminal case except under very limited conditions: Va. Code §§ 19.2-317, -398 allow appeals in criminal cases involving the state revenue and from pretrial orders holding a statute unconstitutional or suppressing evidence under the Fourth, Fifth or Sixth Amendments).[20]

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[20] On January 1, 1997, the Virginia Constitution was amended to allow the Commonwealth to appeal in criminal

Ramdass contends it was "inconceivable that [he] would somehow escape judgment" on the Domino's Pizza case. However, there was ***nothing*** to prevent him from arguing in that case, or the Alexandria judge from concluding, that, in light of the death sentence already imposed, it would have been overkill to convict him of robbery. Or, because Ramdass' crime spree involved multiple serious offenses occurring in different jurisdictions, the prosecutors in the other jurisdictions simply could have decided not to pursue the other cases in light of the death sentence already obtained in Fairfax. The Alexandria prosecutor certainly had the discretion to inform the court that the Domino's Pizza case would not be pursued.

Ramdass' "ministerial" argument is squarely in conflict with Virginia criminal procedure.[21] A final judgment on the Domino's Pizza case was no more "inexorable" than a judgment in the as-yet-to-be-tried cases involving the Alexandria Bragg Towers robbery, the Arlington taxicab robbery or the Alexandria murder. Under Ramdass' faulty reasoning, he would have been entitled to a *Simmons* instruction simply because he was planning to plead

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cases to the extent permitted by the General Assembly and Constitution. 1996 Va. Acts cc. 40 and 911. In 1997, the General Assembly expanded the Commonwealth's right to appeal in criminal cases to include an appeal from a pretrial bail order, Va. Code § 19.2-398(B), and an appeal to the Virginia Supreme Court from an adverse ruling by the Virginia Court of Appeals. Va. Code § 19.2-317.

[21] Judge Murnaghan based his dissent, in large part, upon the same misinterpretation of Virginia law. (JA 415).

guilty in those other three cases, a result certainly not contemplated by *Simmons*.

Not surprisingly, Ramdass never has articulated the instruction he believes *Simmons* entitled him to give the jury. This is because the hypothetical instruction that would have had to have been given in Ramdass' case in order to convey accurate information to the jury demonstrates how far removed Ramdass' case is from *Simmons*. In order to impart accurate information to the jury about Virginia law, an instruction would have had to have stated:

> You are instructed that the conviction in this case will count as the second of three convictions necessary to make the defendant ineligible for parole under state law and that, therefore, if you choose a life sentence, that sentence will not render the defendant ineligible for parole.
>
> In another court, however, the defendant has been tried by a jury and found guilty of another offense but a judgment of conviction has not yet been entered in that case. Under Virginia law, the court in that case is authorized to set aside that guilty verdict or retry the case before a final judgment is entered.
>
> If the court in that case enters a judgment of conviction upon the jury's verdict, it would count as a third conviction making the defendant ineligible for parole for that conviction. However, if the court in that case decides to set aside or retry, or for any other reason does not enter judgment, the jury's verdict in that case could not render the defendant ineligible for parole if you elect to fix punishment at life.

Nothing in *Simmons* even remotely requires imparting such speculative, contingent information to a capital sentencing jury. As the Fourth Circuit observed, the most Ramdass is left with is a complaint

> about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge – the Kayani murder – first, in which case he would have had only one qualifying conviction at the time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

(JA 401-402).[22] The Court of Appeals was correct that Ramdass has no more valid a claim now than he would have had if he had been tried for the capital murder first. He was eligible for parole under state law unless and until a third conviction was entered as a final judgment.

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[22] Ramdass could have asked the trial court for a continuance or for any other relief he believed appropriate regarding the consequences of the scheduling of his trials, but he made no such motion or objection.

Unless a capital murder conviction would constitute the third or subsequent strike, the jury could not be instructed accurately that such a conviction would result in parole ineligibility.[23]

E. The Virginia Supreme Court's Decision Was Not Contrary to Clearly Established Law.

The very fact that the Virginia Supreme Court determined that Ramdass could not have been disqualified from parole eligibility under § 53.1-151(B)(1) by virtue of his capital murder conviction removes this case from the bounds of *Simmons*. In *Simmons*, there was no dispute over the inmate's parole eligibility status. State officials had testified that Simmons was ineligible for parole and the prosecution conceded that fact, although it sought to

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[23] Ramdass notes that he could not have been released during the three weeks between his capital sentencing and entry of the Domino's Pizza judgment because under § 53.1-151(A), he would have been required to serve at least twelve years of his sentences from the Pizza Hut robberies before becoming eligible for parole. (Pet. Br. at 25 n.6). From this fact, he reasons that, "from the date of the capital sentencing trial forward," he was ineligible for parole. (*Id.*). This faulty syllogism, however, only underscores Ramdass' misperception of *Simmons*. There is no doubt that, on the day of sentencing, ***no*** capital murderer will be eligible for ***release***, but that fact is irrelevant under *Simmons*. The information that a defendant is entitled to tell the jury is ***not*** that he will not be released before sentence is imposed, but rather that he will be ineligible for parole on the jury's sentence of life. Under § 53.1-151(C), the most Ramdass' jury accurately could have been told with respect to parole eligibility classifications for a life sentence on the capital crime was that Ramdass would have become eligible for parole after serving twenty-five years of a life sentence.

demonstrate that Simmons would be eligible for ***other*** forms of release. *See Simmons*, 512 U.S. at 158 (plurality opinion). Simmons was ineligible for parole and thus entitled to relief whereas Ramdass was eligible for parole and thus not entitled to relief.

Ramdass discusses at length what South Carolina supposedly argued in *Simmons*. According to Ramdass, South Carolina argued that Simmons had not yet been found to be ineligible for parole, this Court rejected that position and then independently found Simmons to be ineligible. (Pet. Br. at 40-41). Ramdass is wrong.[24] But, even accepting such a spin on *Simmons* as hypothetically true, that circumstance could have no impact on Ramdass' case because the ***Virginia Supreme Court has found as a matter of state law that Ramdass was not ineligible for parole.***

The most fundamental difference between *Simmons* and Ramdass' case, however, is implicitly acknowledged in Ramdass' off-repeated refrain that his Domino's Pizza conviction was "foreseeable, imminent, and inexorable."

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[24] Neither the transcript of oral argument in *Simmons* nor the brief of the State of South Carolina supports the contention that South Carolina argued that Simmons was "technically" eligible for parole. What South Carolina argued was that "this defendant, or any defendant sentenced to a life without parole sentence" nevertheless could be eligible for ***other*** forms of release. *Simmons*, Tr. of Oral Arg., 1994 U.S. TRANS LEXIS 133 at 42 (Jan. 18, 1994). In its brief, the State pointed out that only the Parole Board could determine eligibility, *see Simmons*, Resp. Br. at 95, but it did not argue, as Ramdass has alleged, that Simmons was not ineligible "until the parole board said so." (Pet. Br. at 40). To the contrary, as this Court is well aware, South Carolina conceded that Simmons was ineligible for parole.

As he must, even Ramdass recognizes in this refrain that, while Simmons ***had been sentenced*** for a prior offense qualifying under South Carolina's statute[25] and thus would have been rendered ineligible for parole by the capital murder conviction, Ramdass ***had not been sentenced*** for the Domino's Pizza crime and his capital sentence thus would have counted only as the second of three convictions required by state law. (Pet. Br. at 21, 36).

Ramdass' claim and the rule in *Simmons* are hopelessly at odds: there simply is no support in *Simmons* for the proposition that a state court's determination of parole eligibility may be overturned in federal court by a "functional" or "practical" definition of eligibility. The question before this Court, however, is not whether it is possible to glean such an interpretation of the law from *Simmons*, but rather whether, at the time of the Virginia Supreme Court's decision, such an interpretation was "clearly established Federal law, as determined by [this] Court." *See* § 2254(d)(1). Given the plain language in *Simmons* repeatedly stressing that parole ineligibility is a matter of state law, conditioning its new rule upon a state law determination, and the complete absence in *Simmons* of any warrant for the nebulous standard Ramdass proposes, it simply cannot be said that a "functional" interpretation of parole ineligibility was "clearly established."

Further, in the related "new rule" context, this Court has held that an important measure of whether the state court "acted objectively unreasonably" is whether the

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[25] The South Carolina statute rendered inmates ineligible for parole upon sentencing for a second qualifying offense. *See Simmons*, 512 U.S. at 158 n.2 (plurality opinion).

prisoner's claim was "susceptible to debate among reasonable minds." *O'Dell*, 521 U.S. at 160, *quoting Butler v. McKellar*, 494 U.S. 407, 415 (1990). If an issue is "susceptible to debate," then *a fortiori*, it could not have been "compelled" by precedent. *Butler*, 494 U.S. at 414.

Ramdass' claim undeniably is "susceptible to debate" even today. The rule he seeks would extend *Simmons* to any case in which a capital defendant may become ineligible for parole depending on the occurrence of events outside the parameters of the case being tried. And, although he denies that he is asking to inform the jury about his "prospects for parole" (Pet. Br. at 38 n.8), there is no principled way to so limit the rule he seeks. If due process entitles him to tell the jury that it is highly unlikely he will be paroled because he probably will be made ineligible by hypothetical future convictions, then he also should be able to tell the jury that it is highly unlikely he will be paroled because he will not become eligible for many years, possibly not until after his expected lifespan, or because he is such a dangerous individual that there is no "practical possibility" that any parole authority would release him. While this Court conceivably could extend the concept of "due process" in this manner in a direct appeal case like *Simmons*, it cannot do so in a collateral case.

That such a rule is "susceptible to debate" and, thus, an impermissible new rule cannot be denied. In *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 354 (1997), Justice Stevens was joined by three other Justices in questioning whether the rule in *Simmons* should extend to defendants who are eligible for parole. 118 S.Ct. at 355-356. If that question is "susceptible to debate" in this Court years after *Simmons*

was decided, then Ramdass' claim asking for *Simmons* to apply to him despite the Virginia Supreme Court's determination of parole eligibility certainly is "susceptible to debate" and, thus, new. *See Moore v. Reynolds*, 153 F.3d 1086, 1115 (10th Cir. 1998) (declining to decide in prisoner's favor whether *Simmons* applies to parole eligible defendants because issue is "arguable" after *Brown v. Texas*, and, therefore, "new").

Section 2254(d)(1) and the "new rule" doctrine combine to mandate that a state court's judgment will not be reversed in a federal collateral proceeding unless the prisoner's claim was "clearly established" and "compelled" by this Court's precedent at the time of the state court's decision. The Fourth Circuit properly applied these clear mandates. The Virginia Supreme Court's decision that *Simmons* did not require a no-parole instruction in Ramdass' case was not contrary to or an unreasonable application of this Court's clearly established precedent; *a fortiori*, neither was the rule Ramdass seeks compelled or dictated by such precedent.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted:

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APPENDIX A

OFFENSE	DESCRIPTION	DATE OF OFFENSE	TRIAL	JUDGMENT
purse–snatching, drug dealing, stealing moped, breaking & entering, escape	juvenile offenses	* * *	* * *	punished as juvenile
robbery	Fairfax - no deadly weapon	juvenile – tried as adult	* * *	1988 – 7 years
murder	Alexandria -not capital	7/15/92	guilty plea after capital judgment	10/7/93 –life sentence run concurrent with other sentences
robberies	Fairfax Pizza Hut – w/deadly weapon	8/25/92	jury trial before capital trial	1/22/93 – 76 years
robbery	Alexandria Bragg Towers – w/deadly weapon	8/29/92	guilty plea after capital judgment	2/18/93 – 14 years
attempted murder and robbery	Arlington taxicab driver – w/deadly weapon	8/30/92	guilty plea after capital judgment	11/3/93 – 2 life sentences run concurrent with other sentences
robberies	Alexandria Domino's Pizza – w/deadly weapon	8/30/92	jury trial 1/7/93	2/18/93 – 18 years
capital murder and robbery	Fairfax 7-Eleven	9/2/92	jury sentencing – 1/30/93	4/2/93 - death penalty